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Supreme Court of the United States

OCTOBER TERM, 1965.

A Book Named "John Cleland's Memoirs of A Woman of Pleasure", G. P. Putnam's Sons (Intervenor), *Appellant*, *v.* Attorney General of the Commonwealth of Massachusetts, *Appellee.*	No. 368.

SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF AMICUS CURIAE OF CITIZENS FOR DECENT LITERATURE, INC.*

I.

The CDL brief has many inaccuracies and much that is irrelevant, but it presents, plainly and truly, the essential view of things that underlies efforts to suppress books such as *Lady Chatterley's Lover, Tropic of Cancer* and the book now before the Court. It is the view that inspired Anthony Comstock three-quarters of a century ago, the view neatly encapsulated in Comstock's famous slogan: "Morals, not Art or Literature".** The theory is that standards of con-

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* Amicus will be referred to as "CDL", and pages of the amicus brief by numbers in parentheses.

** See Craig, *Suppressed* Books (World Publishing Co., 1963) page 128; Broun and Leech, *Anthony Comstock, Roundsman of the Lord* (Literary Guild of America, 1927) *passim.*

duct—specifically, standards of sexual morality—can be preserved by forbidding certain kinds of speech and writing, that the preferred sexual morality ought to be preserved by such means, and that it is the business of government to do so.

This, of course, is a plausible political philosophy; indeed, it is a philosophy that has been adopted by other governments in times past, and at the present by governments in other parts of the world. But it is no part of our concept of government. It is explicitly rejected by the First Amendment, and, apart from the First Amendment itself, it is thoroughly inconsistent with the genius of our Constitution. *Kingsley International Pictures Corp.* v. *Regents*, 360 U. S. 684. Moreover, it is of dubious practicability; it has never been demonstrated that curbing expression increases the virtue of the citizens.

The notion that art and literature should be subjugated to this elusive goal is part of a unified and consistent theory. The theory is that the dominant political power can and should be maintained by suppressing speech and writing critical of the government; that the generally-accepted religion can and should be maintained by curbing heretical speech and writing; and that the approved sexual morality can and should be maintained by curbing speech and writing thought to be deleterious to it. This is the basis of the CDL brief. It stands squarely on the case of *Dominus Rex* v. *Curl*, which embodies this thinking, articulately and precisely.

The use of the term "sexual morality", rather than "morality", is required by the fact that the only moral standards that contemporary suppressive legislation has in view are sexual standards. Apart from some effort to deal with representations of violence, there has been no legislative attempt to suppress publication on the ground that a book might impair moral standards by the depiction, or advocacy, of cruelty, avarice, dishonesty or cowardice. The sexual virtue is the only virtue on whose

behalf we are asked to give up the right of free expression in art or literature. The statutes do not seek suppression in the interests of honesty, kindness or courage.

II.

The CDL brief contains much that, under the most tolerant standards, is not properly part of a brief. It relies, for example, on purported statements and documents that not only are outside the record, but are completely unidentified (e.g., 64, 81). It attempts to associate the appellant with other and quite different individuals and corporations, who, CDL, says, also publish the work in question.*

CDL seeks to make a point of the fact that appellant has published other books dealing with sex. Appellant's stand-

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* In listing others who have recently published *Memoirs*, CDL fails to mention New American Library, one of the country's leading publishers (*Mentor* and *Signet* books).

Memoirs has, through its history, been subjected to changes and additions that were not part of the original. In the case of *Commonwealth* v. *Holmes*, for example, the report indicates that the conviction rested, at least in part, on an illustration. CDL refers to matters that are not in the book before the Court. Thus the brief makes a reference to "incest" (68, fn. 37) although there is no incest in the book. Again, the brief quotes a comment that refers to "extraordinarily vivid description of overt homosexual vice" (89); the reference is to a description that appears in other versions of the work and that the publisher's research found not to be authentic. In the book before the Court, Fanny reports what she saw very briefly and in very indirect terms—"they were now proceeding to such lengths as soon satisfied me what they were" (Ex. A, pages 181-182). This is followed by a longer passage describing Fanny's indignant reaction to the incident and Mrs. Cole's vigorous denunciation of homosexuality.

CDL refers to "nine lesbian-type paperback books (including Fanny Hill)" (41). The description, as applied to the book before the Court, is of course incorrect. There are early lesbian incidents in *Memoirs*—early both in the book itself and in the development of Fanny's character—but Fanny soon rejects "this foolery from woman to woman" (Ex. A, page 41).

ing and reputation as a publisher was the subject of testimony at the trial, testimony curtailed by the trial court's ruling that "this action is against the book itself, not against the publisher". The testimony is nevertheless sufficient to show that appellant is an important and reputable publisher of long standing, who has been, and is, the publisher of many distinguished works (R. 82-83). Since, however, CDL has gone outside the record to mention specific books which, in CDL's view, impair appellant's character, we are constrained to submit the catalogs appended to this brief. We do not make a selection of outstanding titles, or choose a year of especial impressiveness; these are the entire current catalogs of appellant, of its wholly-owned subsidiary Coward-McCann and of its affiliated company, John Day.*

The Appendix to the CDL brief constitutes a general perversion of the work it purports to summarize. It is also inaccurate in details.** But more important than the evidence of CDL's misreading is the fact that, by omitting all the insights, reflection, portrayal of character, wit, stylistic elegance and other aspects of literary merit that *Memoirs* contains, CDL gives them emphasis. The contrast between the valueless Appendix and the book itself is further confirmation, we submit, of the values of the book.

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* Since the catalogs are published, we believe the situation appropriate for judicial notice.

** The Appendix describes Fanny's stay with Charles as "an orgy" (App. 4). Their affair is assigned as the reason for Charles's abduction (App. 4)—an event for which the book gives entirely different reasons. The reference to Charles's "horrified family" misses the point that, within the family, there is conflict between a hostile father and a doting grandmother, and that it is this conflict which leads to the abduction (Ex. A, pages 56, 65). Fanny's motivation in the incident with Barville is stated as follows: "As he will pay a large sum of money, Fanny agrees to meet him" (App. 9). The motivation as described in the book is "a sudden caprice, a gust of fancy for trying a new experiment, mix'd with the vanity of proving my personal courage to Mrs. Cole. . . ." (Ex. A, page 166).

The CDL brief also contributes to the strength of appellant's case by quoting an Alexander Pope quatrain, and contrasting Pope's philosophy with Cleland's (66). CDL thus underscores the point that, among its other values, *Memoirs* contains ideas. Pope's quatrain argues that knowledge about vice weakens character; Cleland argues that knowledge about vice strengthens character (Ex. A, page 214). Whether Pope's idea or Cleland's is the more valid is a matter of debate, but that conflicting ideas should be given full hearing is a prime concern of the First Amendment.

CDL quotes at length from testimony of a witness in the New Jersey trial involving *Memoirs*. If the excerpt from the testimony is to be considered, then, we submit, the entire testimony of that witness, and the entire transcript of that trial, should be considered (*G. P. Putnam's Sons* v. *Calissi*, Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-3070-62, June 3 and June 4, 1964). CDL also relies on the trial judge's opinion in that case (86 N. J. Super. 82, 205 A. 2d 913). Among the many errors of fact and law in that opinion (including reliance on decisions which at the time of the opinion had been reversed or overruled) is the designation of the witness quoted by CDL as a witness for the publisher, when in fact he was a witness for the Prosecutor (86 N. J. Super. 82, 91, 205 A. 2d 913, 919).

CDL quotes writers who have referred to the book in question as "pornographic". The term "pornographic", literally, means writing about a prostitute, and in this sense *Memoirs* is obviously pornographic. In another sense, it refers to writing which is sexually arousing; as we have submitted in our main brief, the stimulation of a sexual response does not justify the suppression of art or literature. The term "hard-core pornography" has been used in judicial opinions, but "pornography" is not "hard-core pornography". The ultimate legal concept involved here is that of the "obscene", a term which, whatever its non-legal uses may be, has a specific function in the law. Under

the decisions of this Court, the word "obscene" states a conclusion on the constitutional question of whether challenged material lies within or without the protection of the First Amendment. The word "pornographic", on the other hand, denotes no legal concept, and has no constitutional significance.

Throughout its brief, CDL confuses conduct and expression (*e.g.*, 80, fn. 49; 88). These are concepts which must be kept distinct for purposes of the First Amendment. The distinction has been given emphasis by this Court. (See, for example, *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, 689.)

CDL urges that *Grove Press* v. *Gerstein*, 378 U. S. 577, "should be abandoned" (78). "We believe," CDL argues, "the overwhelming majority of the people in this nation disagree with the view that holds 'Tropic of Cancer' acceptable to this nation's standards and outside the proscription of *Curl's* case" (83-84). If the premises on which the brief amicus is based are accepted—that the principles of *Curl's* case are controlling and that the application of the First Amendment guaranties are a matter of majority sentiment (and if CDL's dubious assumptions about majority sentiment are granted)—then, we agree, *Grove Press* v. *Gerstein* should be abandoned. The arguments that CDL makes in the present case would, if they prevailed, require the overturning of *Grove Press* v. *Gerstein*. They would also require the overturning of the lower court decisions that in 1960 permitted the publication of *Lady Chatterley's Lover*, and in 1934 permitted the publication of *Ulysses*. Moreover, they would require the suppression of much, if not indeed the greater part, of the most honored literature produced in this country during the last several decades. The following authors and their publishers, should, if the CDL view is accepted, be imprisoned, and their books rounded up and destroyed: James Baldwin *(Another Country; Giovanni's Room);* Erskine Caldwell *(God's Little Acre);* James Gould Cozzens *(By Love Possessed);* James

T. Farrell *(Studs Lonigan);* William Faulkner *(Sanctuary);* James Jones *(From Here to Eternity);* Norman Mailer *(The Naked and The Dead; The Deer Park);* Mary McCarthy *(The Group);* John O'Hara *(Ten North Frederick);* John Updike *(Rabbit, Run);* Calder Willingham *(Eternal Fire).* The list, of course, is not exhaustive.

CDL devotes considerable space to the *dicta* of this Court, prior to *Roth* and *Alberts,* that refer to obscenity, and to the 1957 ALI tentative draft of a Model Penal Code. The former stand for no more than the proposition that anti-obscenity legislation has a permissible application, a proposition about which there is no dispute in the present case. As to the latter, its relevance is only in helping to give content to the word "prurient". The statements by the reporter for the Model Penal Code quoted by CDL (76-78) are the views of that individual, put forth prior to *Roth* and *Alberts.* They are views inconsistent with the decision in those cases and with subsequent decisions of this Court. The *Roth* and *Alberts* opinion finds the constitutional justification for anti-obscenity statutes, in the light of the prohibitions contained in the First Amendment, in the fact that only material that is utterly without redeeming social importance is affected. Beyond this such statutes may not go without contravening the guaranties. This leaves no room for the kind of balancing that the quoted statements advocate. If the work is not utterly without redeeming social importance, then, in a constitutional sense, it is simply not obscenity, however one might in some other context—artistic or moral—choose to characterize the material. A specific expression may be obscene under canons of artistic criticism, or obscene under canons of morality, but the sole issue in this Court is whether it is obscene in the sense that it is unprotected by the First Amendment.

The concept of "well-written obscenity" is, if the term "well-written" is used to denote literature of value, rather than in a very narrow grammatical or stylistic sense, a contradiction in terms. If writing has value as literature, then it cannot be said to be utterly without redeeming social importance. We beg the constitutional question when we refer to a book in issue as obscenity, before we consider whether or not it has those values that constitute social importance.

No subject matter is foreclosed to the writer, and while material is not saved from condemnation by the fact that it is "well-written" in a restricted sense, writing that constitutes creative literary product is itself socially valuable. Distinguished lyric poetry, for example, may be nothing more than "good writing". But this question is not reached in the present case. The book before the Court, as we have set forth in our main brief, has not only an artistic and creative style; it has the other merits that are associated with fiction of value, and it presents, in addition, a historical value.

CDL would leave the determination of the question of freedom of expression to juries. This is, of course, consistent with their view that such questions should be decided according to majority wishes. The right to jury trial is, of course, an important right to a defendant, and there are various issues in obscenity prosecutions as to which a jury's findings, properly arrived at, will be dispositive. But whether the publication itself is expression protected by the First Amendment is a constitutional question on which judicial determination is a matter of right in the citizen and a matter of duty for the courts. This proposition must now be regarded as firmly established.*

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* It is a necessary implication, we submit, of *Roth* and *Alberts*. See also *Jacobellis* v. *Ohio*, 378 U. S. 184, 188-189, 197, 203; *Manual Enterprises* v. *Day*, 370 U. S. 478, 488; and *Kingsley International Pictures Corp.* v. *Regents*, 360 U. S. 684, 708.

To leave the matter of whether given speech or writing is entitled to constitutional protection in the hands of jurors, on the theory that they represent a community consensus, is to make the application of the First Amendment turn on soundings of prevailing sentiment. It changes a constitutional provision designed for the protection of minority expression into a weapon for the enforcement of majority views.

CDL refers to the witnesses in the present case as "a group of literateurs", and argues that "They cannot control this determination where the book is to be offered for general sale" (85). To begin with, "they" do not "control" the outcome; the Court controls the outcome. But the testimony of qualified experts is highly pertinent. In a case like the present one—where the testimony comes from highly competent witnesses; where it is detailed, unshaken by cross-examination, confirmed by documentary evidence, and not opposed by any significant countervailing testimony—the Court should, we submit, deal with the issue as it would with any issue where the evidence is similarly substantial, credible and unopposed. CDL's proposition that such evidence is not pertinent "where the book is to be offered for general sale" would make the general population the judges of what ought or ought not to be published. We refer to the material on pages 4 and 5 of our reply brief, and ask whether the merits of *Ulysses* are visible to the general population. The point is not limited to literature. How well would the music of Schoenberg do in a popularity contest? Or, for that matter, the music of Vivaldi? Values in art and literature exist, and are important to society, regardless of whether all members of the society, or even a majority of them, are in a position to appreciate those values. Those who are qualified to explain and appraise the values in a given work of art or literature can give the Court evidence upon which to determine whether the

work has the artistic or literary value that constitutes redeeming social importance.

There is an implication here that the "literateurs" are biased, and that the persons who may testify as to the literary value of any challenged work will be biased. We respectfully refer to the material on pages 26 and 27 of our main brief, which, we submit, demonstrates the invalidity of the charge insofar as the witnesses in the present case are concerned. We point, moreover, to the fact that the published reviews in the record set forth the independent professional opinions of the eminent individuals who wrote the reviews—V. S. Pritchett, perhaps the most respected of present-day literary critics; Brigid Brophy, whose works of criticism are admired both abroad and in this country; J. Donald Adams, for many years editor of the *The New York Sunday Times Book Review;* and the prestigious, if anonymous, editors of *Time* magazine. Nor is there any reason to suppose that, apart from the present case, qualified critics will always be arrayed against the application of the statutes. In a recent obscenity trial in New York (*People* v. *Bruce,* N. Y. Crim. Ct. Docket No. A4406, 1964) there appeared, as expert witnesses for the prosecution, John Fischer, editor of *Harper's* magazine, Marya Mannes, celebrated critic and essayist, and Robert Sylvester, a prominent journalist and writer. We may expect critics and scholars of standing and recognized ability, who give detailed testimony to respect the oath that they take as witnesses. Their reputations for knowledge, perception and integrity have a practical importance, even if we were to assume that their characters are weak. It is a situation in which the promptings of self-interest coincide with the demands of simple honesty.

CDL speaks of a decision holding the book to be protected expression as one that would "force the distribution of Fanny Hill upon the State of Massachusetts" (91). The use of the word "force" is severely inappropriate. No one

is forced to read a book. Moreover, we see here again the attitude that a majority of the population should be given the power to decide what a minority is to be permitted to read. In any situation where the First Amendment protects dissident or disapproved expression, it goes against the wishes of the majority, and, in the CDL sense, "forces" the expression upon them. But there is a more serious point involved in the quoted statement—the point that states should be allowed to vary in their application of constitutional guaranties of free expression. With deep respect for the views expressed by Mr. Justice Harlan in *Roth* and *Alberts*, we submit that the approach described would, both as a matter of practicality and as a matter of principle, thwart the purposes of the First Amendent.

Publishing is a national enterprise. A book is produced and distributed by processes that take no account of state lines. The author may live in one state, the publisher operate in another, and the manufacture of the book take place in a third. Distribution is nationwide, and at the local level much of it is done through metropolitan areas that disregard state lines. New York City distributors send their books into New York, New Jersey and Connecticut; Philadelphia distributors operate in New Jersey as well as Pennsylvania. Boston distributors cover New England.* At the same time, book publishing is centered in New York, and the latitude allowed that one state in determining what is bannable would affect readers in every state.

Moreover, the economics of publishing are such that the prospect of the loss of part of the national market may well produce negative decisions on whether or not a particular book will be published. The problem is not so much with the big best seller. The problem is with the first work of a new writer, or the work of an established writer whose

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* See, for example, *Publishers' Weekly*, August 16, 1965, p. 18 and October 21, 1963, p. 24.

merit has been recognized but whose books are marginal so far as economic return is concerned. If publishers do not have constitutional principles of nation-wide application to go by—if distribution in some states is foreclosed or unpredictable—there will inevitably be a self-imposed censorship. This, of course, constitutes the most prior of prior restraints.

The interests that anti-obscenity statutes are designed to protect may be a matter of state concern, but the interests with which such statutes come into conflict—the interests that, under the Constitution, limit their application—are a matter of national concern. There will inevitably be books that suffer nation-wide suppression as a result of the absence of nation-wide protection. Moreover, if freedom of expression is to mean one thing in one state, and a different thing in another state, then it necessarily follows that decisions of this Court holding that First Amendment guaranties are incorporated in the Fourteenth Amendment must be overruled. The guaranties do not change their meaning when we pass across state lines. If the guaranties are applicable to state action, then they are applicable to the action of every state.

CDL refers to a trial judge's dismissing an indictment as to *Fanny Hill* while permitting the prosecution to go forward with respect to the other publications named (42), and to two cases in which district attorneys eliminated *Fanny Hill* from indictments while proceeding against other books (65). This is relevant to the concern that, since this Court is the ultimate guardian of First Amendment freedoms, the cases arising from the enforcement of anti-obscenity legislation may impose a heavy burden. We submit that, insofar as cases like the present one are concerned—cases in which a demonstration of literary merit or other value can be made—the burden will become progressively lighter, not heavier. The instances cited by CDL are examples of the capacity of lower courts and prosecutors to follow a course pointed out by this Court. Another ex-

ample is furnished by the actions of the Supreme Court of Illinois, which had unanimously held *Tropic of Cancer* to be obscene. After this Court's decision in *Grove Press* v. *Gerstein,* the Illinois Supreme Court withdrew its opinion and affirmed the trial court's decision holding the work entitled to constitutional protection (*Haiman* v. *Morris,* Supreme Court of Illinois, 1964, Docket No. 37276, order dated July 7, 1964). In its subsequent opinions (*Chicago* v. *Kimmel,* 31 Ill. 2d 202, 201 N. E. 2d 386 and *People* v. *Bruce,* 31 Ill. 2d 459, 202 N. E. 2d 497), the Supreme Court of Illinois applied the test of social importance to reverse convictions despite a stated distaste for the material involved.

Further confirmation by this Court of the principles which, we submit, have already been established in its earlier decisions, will have the effect of diminishing prosecutions and suppressive proceedings against publications to which they should not apply, and will thus tend to alleviate the judicial burden. A decision upon the present book and the present record in favor of freedom and against suppression can only serve to enhance clarity in the field and to diminish litigation concerning books of value.

IV.

We have referred above to the case of *Dominus Rex* v. *Curl,* 2 Strange 788, 93 Eng. Rep. 849, as the authority on which the CDL position is based. The rationale of the case is set forth in the argument of the King's Attorney General. That argument is quoted in the CDL brief (57-58), and the case itself is cited eight times. The brief attacks the principle that anti-obscenity legislation may constitutionally apply only to publications that are utterly without social importance on the ground that it is inconsistent with *Dominus Rex* v. *Curl* (75).

The case was decided in the first year of the reign of George II, the year 1727. We do not deprecate the CDL

argument because it rests on an ancient case. The date is important not because it is long past, but because it places the case in a time that is significant in relation to the First Amendment. It was a time of political and philosophical struggle. The case itself was a victory for the theory of repression. The larger contest, however, had a different outcome. By the end of the century our Constitution had explicitly rejected the ideas that prevailed in *Curl's* case.

There were two concurrent prosecutions of *Curl.* One was for the publications alleged to be obscene, and this is the case on which CDL relies. The other was a prosecution for publishing the memoirs of a government spy; here the basis of the prosecution was that the publication was seditious.* Curl was convicted in both cases. In the case that CDL cites, the King's Attorney General argued as follows:

> "What I insist upon is, that this is an offence at common law, as it tends to corrupt the morals of the King's subjects, and is against the peace of the King. Peace includes good order and government, and that peace may be broken in many instances without an actual force. 1. If it be an act against the constitution or civil Government; 2. If it be against religion; and, 3. If against morality.
>
> "1. Under the first head fall all the cases of seditious words or writings. * * *
>
> "2. It is a libel if it reflects upon religion, that great basis of civil Government and society; and it may be both a spiritual and temporal offence. * * *
>
> "3. As to morality. Destroying that is destroying the peace of the Government, for government is no more than publick order, which is morality. My Lord Chief Justice Hale used to say, Christianity is part of the law, and why not morality too? * * *"
> (2 Strange 788, 790; 93 Eng. Rep. 849, 850.)

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* Straus, *The Unspeakable Curll* (Chapman & Hall, Ltd. 1927) pages 119-120.

The argument was accepted by the court, and the motion to set aside Curl's conviction was denied.*

The fact that the King's Attorney General combined the three points in a single argument is significant. The same spirit that would stamp out sedition and heresy would repress art and literature in the supposed interests of an approved sexual morality. The three points are part of a unified pattern of government, a pattern that the First Amendment excludes. It is now well settled that "seditious words or writings", distinct from conduct, may not be suppressed, nor may heretical words or writings be suppressed. We submit that *Roth-Alberts,* considering the third aspect of restraint on expression, limits suppression of writing dealing with sex to material that is utterly lacking in literary value or any other form of social importance.

Respectfully submitted,

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* Strange reports that Curl went to the pillory, but it appears that the punishment in the obscenity case was a fine, and that his appearance in the pillory was the result of the prosecution for sedition. Straus, *op. cit. supra,* pages 119-120.